86 1675

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

RANDY J. DELACRUZ, Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

WILLIAM C. HALSEY
355 West Vista Way
Suite A
Vista, CA 92083
(619) 941-5092

Counsel for Petitioner

58

QUESTIONS PRESENTED

1. Does a defendant charged with common law murder have a constitutional right to be tried before a jury comprised of a representative cross-section of the community?

2. Does a defendant charged with common law murder have a constitutional right to be acquitted if only five members of a seven-member panel vote for a guilty verdict?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RANDY J. DELACRUZ, Petitioner

v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner Randy J. Delacruz respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals, entered in the above-entitled proceeding on January 13, 1987.

OPINIONS BELOW

The decision of the United States Court of Military Appeals is set forth in the appendix at page 55. The relevant text follows:

> On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, it appears that appellant's court-martial was properly constituted and its verdict rendered under the Uniform Code of Military Justice, 10 U.S.C. Section 801 et. seq. Accordingly, it is by the Court this 13th day of January, 1987
>
> ORDERED:
>
> That said petition is granted; and
>
> That the decision of the United States Army Court of Military Review is affirmed.

The decision of the United States Army Court of Military Review is set forth in the appendix at page 56. The relevant text follows:

> On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

JURISDICTION

Petitioner, an active duty member of the United States Army and subject to the provisions of 10 U.S.C. Sections 801 et. seq. (Uniform Code of Military Justice), was tried by General Court-Martial in Bremerhaven, Federal Republic of Germany, for violations of Articles 118 (murder), 128 (assault), and 86 (unauthorized absence), respectively, of the Uniform Code of Military Justice, [10 U.S.C. Sections 918, 928, and 886 (1982), respectively]. Following petitioner's conviction and sentence to life imprisonment, he petitioned the United States Army Court of Military Review and the United States Court of Military Appeals for review of the issues set forth herein. Both petitions were granted, but the appeals were denied.

The jurisdiction of this Court to review the decision of the United States

Court of Military Appeals is invoked under 28 U.S.C. Section 1259.

STATUTES INVOLVED

10 U.S.C. Section 825 [Article 25, Uniform Code of Military Justice].

Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c) (1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special

courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may

be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, the word "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d) (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial tempera-

ment. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

10 U.S.C. Section 852 [Article 52, Uniform Code of Military Justice]. Number of votes required

(a) (1) No person may be convicted of an offense for which the death penalty

is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

(b) (1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.

(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

STATEMENT OF THE CASE

Following a preliminary investigation into the charges against petitioner pursuant to appropriate statutes and regulations, the convening authority ordered petitioner to stand trial by general court-martial. The convening authority assigned members (jurors) in accordance with 10 U.S.C. Section 825 [Article 25, Uniform Code of Military Justice]. The primary group of members consisted of two lieutenant colonels, two majors, and three captains. A secondary group of members was listed in the event petitioner requested enlisted members to be assigned to his court-martial pursuant to 10 U.S.C. Section 825 [Article 25, Uniform Code of Military Justice]. The secondary group consisted of the same two lieutenant colonels, the same two majors, and replaced the three captains with two command sergeants major and one first

sergeant. The text of the convening order is reprinted in the appendix hereto, pp. 53-54, infra.

Prior to assembly of the court-martial, petitioner moved the trial court to order a selection of jury members who would more fairly represent a cross-section of his peers than either of the panel of jury members who had been appointed by the convening authority.[1]

---

[1]According to the World Almanac, the United States Army's total strength on active duty in 1985 was 776,244 of which 94,103 were commissioned officers and 666,567 were enlisted personnel.

Title 10 U.S.C. Section 523 limits the number of majors, lieutenant colonels, and colonels who may be serving on active duty. By extrapolation from the table provided, the maximum number of lieutenant colonels who would have been on active duty in 1985 is 10,591. Therefore, lieutenant colonels represented approximately 1.4% of the active duty strength. By extrapolation from the table provided, the maximum number of majors who would have been on active duty in 1985 is 16,296. Therefore, majors represented approximately 2.1% of the active duty strength. Together, the

The text of the motion is reprinted in the appendix hereto, pp. 33-36, infra.

In addition, petitioner moved to set aside the provisions of Article 52(b)(2), Uniform Code of Military Justice [10 U.S.C. 852(b)(2)], insofar as it requires only a two-thirds concurrence of the jury to reach a finding of guilty, and order

---

lieutenant colonels and majors represented a total of approximately 3.5% of the active duty strength. The number of captains is not regulated by law, except for the total authorized officer strength. At the extreme, if captains represented the remaining officers on active duty in 1985, they would have represented approximately 8.6% of the active duty strength. An all-officer jury would, at the most, represent approximately 12.1% of the active duty strength of the United States Army.

Petitioner has not been able to determine the number of persons serving in the various enlisted ranks on active duty in 1985; however, it is noted that command sergeants major and first sergeants are the two highest enlisted ranks in the United States Army. It is suggested that command sergeants major and first sergeants comprise no greater percentage of the total strength than do lieutenant colonels and majors.

the jury, which should consist of twelve members or in no case less than six members, to vote unanimously before returning a finding of guilty to any offense. The text of the motion is reprinted in the appendix hereto, pp. 37-52, infra.

The United States did not submit written briefs regarding the motions.

The trial judge denied both motions as follows:

> Well, I've evaluated the written brief's submitted by the defense and the authorities that were submitted to the court by both parties. And, I want to state that--it's not my function to decide what I, personally, feel the law should become, sometime in the future, or what it might become, as the result of any, possible, legislative or appellate action. It's my duty, as military judge, to apply the law, as it exists, today. And, since the great weight of current, legal authority is in opposition to the defense position, on each of these three motions, I am, accordingly, compelled to deny --these motions I have no discretion in this area. And, so, the defense motion--all three of those motions for appropriate

relief--are denied.

Following the trial judge's ruling, petitioner elected trial by military judge, alone. He was convicted and sentenced to life imprisonment, among other punishments.

Petitioner appealed his conviction to the United States Army Court of Military Review, assigning as errors the trial judge's rulings on his challenge to constitutionality of Articles 25 and 52 of the Uniform Code of Military Justice. The United States Army Court of Military Review affirmed the conviction and sentence without addressing the substance of petitioner's assignment of errors. The text of the Court's decision is set forth under the section entitled, "Opinions Below," p. 8, supra.

Petitioner petitioned the United States Court of Military Appeals for

review of his conviction and sentence. Once again, the bases of the petition were the trial judge's rulings on his challenge to constitutionality of Articles 25 and 52 of the Uniform Code of Military Justice. The United States Court of Military Appeals affirmed the decision of the United States Army Court of Military Review without addressing the substance of either issue. The text of the Court's decision is set forth under the section entitled, "Opinions Below," pp. 7-8, supra.

REASONS FOR GRANTING THE WRIT

I.

In carrying out its constitutional mandate to regulate the armed forces, Congress must comply with the restrictive requirements of the Bill of Rights.

Article I, Section 8, of the United States Constitution grants Congress the power "To make Rules for the Government and Regulation of the land and naval Forces" and "To make all Laws which shall be necessary and proper for carrying into Execution of the foregoing Powers." The Bill of Rights, including the Fifth and Sixth Amendments, proposed only six months following adoption of the Original Seven Articles, were intended as "further declaratory and restrictive clauses" "in order to prevent abuse" of the Constitution's power. Although the Fifth Amendment specifically excludes "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger" from the requirement of a presentment or indictment, no other amendment, or even the remaining clauses of the Fifth Amendment, address any limitation of the rights of the land

or naval forces, or of the militia. Therefore, unless a strong case can be made for the abridgment of constitutionally guaranteed rights by reason of the Necessary and Proper Clause, Congress does not have the power to enact any law which would abridge those rights. This is so whether or not the person subject to such law is a civilian or a member of the land or naval forces.

In determining the lack of jurisdiction of the court-martial over an ex-serviceman for an offense committed while on active duty, in the case of Toth v. Quarles, 350 U.S. 11 (1955), the Supreme Court held that "the constitutional grant of power to Congress to regulate the armed forces" was not entitled to a broad construction. "That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to

hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause." Toth, supra, at page 21. The Court refused to extend court-martial jurisdiction to those cases because "[i]t is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians.

II.

The provisions of Article 25, Uniform Code of Military Justice, [10 U.S.C. Section 825], insofar as it permits the exclusion of a class of persons from the venire, are in conflict with petitioner's right to jury trial guaranteed by the Sixth Amendment, and with the decisions of this Court.

Article 25 specifically excluded enlisted personnel serving in petitioner's unit, but not officer personnel serving in petitioner's unit, from serving as members of his court-martial. Additionally, Article 25 specifically excluded all privates E-1 from serving as members of petitioner's court-martial. It is submitted that no rational basis exists for disqualifying enlisted personnel from an accused's unit for service on his court-martial, while allowing officers from his unit to serve. It is neither necessary nor proper to exclude that class of identifiable persons from the jury venire.

Absent a specific request by an accused, Article 25 requires the convening authority to exclude all enlisted personnel, approximately 88% of the eligible venire, from an accused's court-martial. Thus, the statutory

scheme makes compliance with the fair-cross-section requirement established by this Court in Duren v. Missouri, 439 U.S. 357 (1979), impossible. Once again, it is neither necessary nor proper for Congress to exclude enlisted personnel from service on courts-martial without a specific request from an accused. Furthermore, even if the accused requests enlisted personnel to be included, the statute permits the convening authority to limit the number of such class of persons to one-third of the total membership, when that class actually comprises approximately 88% of the venire. If enlisted personnel are eligible to serve on courts-martial, there is no rational reason why their participation should be limited in numbers radically less than their proportion to the community as a whole.

The convening order for petitioner's court-martial was prepared in accordance with Article 25. In fact, a dual purpose convening order was prepared to anticipate the eventuality that petitioner would request that enlisted members be appointed to his court-martial. Since the convening authority was required to personally select the members, which consisted of field grade officers (lieutenant colonels and majors), company grade officers (captains but no first or second lieutenants), senior staff non-commissioned officers (command sergeants major and a first sergeant), he specifically excluded general officers, senior officers, junior staff non-commissioned officers, non-commissioned officers, and non-rated enlisted personnel.

It was neither necessary nor proper for Congress to include within the Uniform Code of Military Justice a scheme

for the systematic exclusion of a sizable, identifiable class of persons from service on military courts-martial. It is suggested that Congress could have met its constitutional mandate to regulate the armed forces without infringing upon the individual rights of servicemen as regards the Sixth Amendment right to jury trial. Its failure to do so was an unconstitutional infringement on petitioner's right to trial by jury as defined in Duren v. Missouri, supra.

III.

The provisions of Article 52, Uniform Code of Military Justice, [10 U.S.C. Section 852], insofar as it allows for a finding of guilty of serious offenses by a mere two-thirds concurrence, are in conflict with petitioner's right to jury trial guaranteed by the Sixth Amendment, and with the

decisions of this Court.

Article 52 permits a finding of guilty for non-capital offenses by the concurrence of only two-thirds of court-martial panel. Petitioner's court-martial convening order provided for seven members; a two-thirds concurrence would have required five votes for guilty. Petitioner recognizes that a unanimous verdict in non-capital cases involving twelve-member juries is not constitutionally required. Apodoca v. Oregon, 406 U.S. 404 (1972) [9 of 12 sufficient] and Johnson v. Louisiana 406 U.S. 152 (1972) [10 of 12 sufficient]. This Court has addressed the issue of less-than-unanimous verdicts in non-capital cases involving a six-member jury in the case of Burch v. Louisiana, 441 U.S. 130 (1979). In that case, the Court held at page 139:

> "More importantly, we think that when a State has reduced the size of its juries to the minimum number of jurors permitted by the Constitution, the additional authorization of nonunanimous verdicts by such juries sufficiently threatens the constitutional principles that led to the establishment of the size thres hold that any countervailing interest of the State should yield."[2]

It follows that if five of six is constitutionally insufficient, five of seven must also fail constitutional muster.

Petitioner can conceive of no reason to justify the denial of this basic constitutional right to members of the armed forces, and if the statutory denial of such a right is not necessary and proper

---

[2]Although not an issue in this case, it is noted that Article 19, Uniform Code of Military Justice [10 U.S.C. Section 816], prescribes the minimum number of members for a general court-martial as five, one short of the constitutional minimum delineated by this Court in the case of Williams v. Florida, 399 U.S. 78 (1970).

to the execution of the constitutional mandate, it must be held beyond the power of Congress to deny.

IV.

The failure of the Court of Military Appeals to address the constitutionality of the statutes concerned leaves important and unresolved issues.

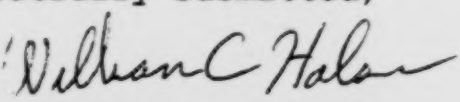
In affirming petitioner's conviction and sentence, the Court of Military Appeals simply stated that "the court-martial was properly constituted and its verdict rendered under the Uniform Code of Military Justice, 10 U.S.C. Section 801 et. seq." Petitioner does not contend that his conviction was not in accordance with the Uniform Code of Military Justice; he challenges the constitutionality of certain of its

provisions. The Court of Military Appeals was presented with the issues, but did not address them. If the Court of Military Appeals refuses to address those issues, they will remain uncertain and unresolved unless this Court rules upon them.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,



WILLIAM C. HALSEY
355 West Vista Way
Suite A
Vista, CA 92083
(619) 941-5092

Counsel for Petitioner

APPENDIX

UNITED STATES	)	
	)	
V.	)	
	)	
DELACRUZ, RANDY J.	)	MOTION FOR NEW
553-08-1620	)	SELECTION OF
US ARMY, PV2	)	MEMBERS
C Company, 4th	)	
Battalion, 41st	)	
Infantry Regiment	)	
2d Armored Division	)	
(Forward) APO New	)	
York 09355	)	

The defense moves for a new selection of court members that more fairly represents a cross section of his peers.

Article 25 of the UCMJ prescribes characteristics for selection for duty as a court member, including ages, education, training, experience, length of service, and judicial temperament. It also mandates that the panel members shall be superior in rank to the accused. These limitations violate the constitutional guarantees to trial by jury, due process of law, and equal protection of the law. Where an accused is on trial

for a charge which, if convicted, mandates a life sentence, he should be able to appear before a court which genuinely represents the community in which the alleged offense was committed. O'Callahan v. Parker, 395 U.S. 258 (1969), Toth v. Quarles, 350 U.S. 11 (1955), and Glasser v. United States, 315 U.S. 60 (1942).

It is recognized that the issue is not new; there is authority which indicates that the right to jury trial is not enjoyed by servicemembers. United States v. Kemp, 46 CMR 152 (CMA 1973), United States v. Delp, 11 M.J. 836 (ACMR 1980), pet denied 12 M.J. 320 (CMA 1981), and United States v. Seivers 9 M.J. 612. Nevertheless, the defense respectfully questions the continuing validity of this authority; it rests only on historical conditions which no longer obtain and on alleged distinctions between the military

and civilian communities. These factors are discussed on page four of the five page brief submitted in connection with Article 52 of the UCMJ, and are incorporated here by reference.

The continued exemption of the military from the jury trial requirement of the Sixth Amendment violates the accused's right to the equal protection of the law. In peacetime, in a garrison environment, PV2 Delacruz is charged with a common law felony, murder, yet he is denied the protection of a jury trial which a civilian, facing the same charges, would enjoy. To treat person similarly situated differently with respect to fundamental constitutional rights, the Government must demonstrate a compelling interest in justification. Again, general assertions that "the military is different" are inadequate; the Government must adduce some concrete,

compelling reason to support its denial of one of the accused's fundamental rights in peacetime.

/s/
JOSEPH C. SWETNAM
CPT, JAGC
Trial Defense Counsel

UNITED STATES	)	
	)	
V.	)	
	)	
DELACRUZ, RANDY J.	)	MOTION FOR
553-08-1620	)	APPROPRIATE RELIEF
US ARMY, PV2	)	
C Company, 4th	)	
Battalion, 41st	)	
Infantry Regiment	)	
2d Armored Division	)	
(Forward) APO New	)	
York 09355	)	

The defense respectfully requests that the court set aside the provisions of Article 52(a)(2), UCMJ, insofar as it requires only a two-thirds (2/3) concurrence of the panel members to reach a finding of guilty, and order the panel, which should consist of twelve members or in no case less than six members, to vote unanimously before a finding of guilty to any offense.

Further, the defense respectfully requests that the court set aside the provisions of Article 52(b)(2) and (3) insofar as these provisions require only a three-fourths (3/4) concurrence to

sentence an accused to confinement at hard labor for a period of ten years or more, and only a two-thirds (2/3) concurrence to sentence an accused to any lesser sentence, and order the panel to concur unanimously before imposing any sentence.

The basis for this motion is that permitting a less than unanimous verdict from a panel in peacetime and/or for non military offenses violates the servicemember's Fifth Amendment due process and equal protection rights, and further deprives the servicemember of the Sixth Amendment guarantee to a jury trial.

ARGUMENT

A. THE MILITARY JUDGE MAY PROPERLY RULE UPON THE CONSTITUTIONALITY OF THE PROVISIONS OF THE UCMJ.

Determining the constitutionality of acts of Congress as applied to the military justice system is a responsibil-

ity imposed on military tribunals at all levels, trial or appellate. U.S. v. Matthews, 16 M.J. 354 (CMA 1983). It is submitted that Congress did not intend to deprive military courts of these responsibilities, and that public policy is consistent with the exercise of these responsibilities. Military trial judges preside over the conduct of criminal proceedings in which punishment potentials include significant periods of confinement, the lifetime ramifications of a federal conviction, and the ineradicable stigma of a punitive discharge. Middendorf v. Henry, 425 U.S. 25 (1976), U.S. v. Matthews, supra. As Article I judges, military trial judges and military appellate judges at Courts of Review level do lack the Article III protections with respect to salary and tenure. Although this was deemed essential in Northern Pipeline

Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___, 102 S.Ct. 2858, 2867 n. 14, 73 L.Ed. 2d 598 (1982), a case which concerned the power of other legislative courts, i.e., bankruptcy courts, to rule on the constitutionality of relevant acts of Congress, military tribunals nonetheless possess, by necessary implication and decisional law, the inherent power to weigh the constitutionality of the various provisions of the UCMJ. This inherent power flows from military courts' role of guarding the constitutional interests and rights of servicemembers. Burns v. Wilson, 346 U.S. 137 (1953), U.S. v. Ezell, 6 M.J. 307 (CMA 1979), U.S. v. Frischholz, 36 CMR 306 (CMA 1966).

Differing analysis of constitutional questions in courts-martial may not be justified simply because the military court is an Article I court. Article III

courts can and will review decisions of Article I courts, utilizing Article III standards. While the traditional concern has been the issue of jurisdiction, the review of the court-martial action can also concern issues of fundamental constitutional rights. Schlesinger v. Councilman, 420 U.S. 738 (1975). When Article III courts do intervene, they use Article III standards, giving due regard to the special circumstances of the military environment. If the Article III courts may use constitutional standards to review court-martial actions, then Article I courts must apply the same constitutional standards. As a practical matter, Article I courts should apply Article III standards to forestall unnecessary and judicially wasteful collateral attacks on military convictions in federal court. This reasoning and policy concern was found significant

by the Court of Military Appeals in U.S. v. Matthews, supra.

B. THE PROVISIONS OF ARTICLE 52(a)(2) VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT, AND THE RIGHT TO JURY TRIAL UNDER THE SIXTH AMENDMENT AS SUCH HAS BEEN PRESERVED IN THE MILITARY.

In 1978, the Supreme Court decided that a fact-finder consisting of five persons, even though a unanimous verdict was returned, could not survive constitutional scrutiny. Ballew. V. Georgia, 435 U.S. 223 (1978). In Burch v. Louisiana, the Court held that a nonunanimous guilty verdict, five of six members concurring, impugned the accused's Sixth Amendment right to jury trial. 441 U.S. 130 (1979). Both Ballew and Burch relied on in-depth studies which addressed the effect of nonunanimous verdicts and the decreasing membership on the fact-finder

body. This research had not been performed in 1949, when Congress enacted Article 52 of the UCMJ. The concerns expressed in these cases are especially critical to military servicemembers, given the fact that many panel trials consist of seven members or less, which need only a two-thirds concurrence for a finding of guilty. Military trials involve the two key concerns of Burch and Ballew--(1) small membership on the jury and (2) the less than unanimous verdict. Each of these concerns standing alone endangers the servicemember's fundamental rights; both factors are present in the military setting. The requirement for a two-thirds concurrence is deceptive, especially given the low panel membership on military tribunals. The two-thirds concurrence can create a situation in which the defense has to convince up to 66% of the panel members of the accused's

innocence. Provided is a table which displays this fact.

Number of Members on the Panel	Number Needed for 2/3 Concurrence	Min Number of Members for Finding of NG	Min % of Members for Finding of NG
3	2	2	66%
4	3	2	50%
5	4	2	40%
6	4	3	50%
7	5	3	42%
8	6	3	38%
9	6	4	44%
10	7	4	40%
11	8	4	36%
12	8	5	41%

Such a burden on the defense constitutes neither the reasonable doubt that should be required of the government to convict at federal criminal proceedings for serious offenses, nor does it accord with fundamental fairness and due process.

The size of the fact-finder and the unanimity of its verdict in a prosecution for serious offenses involve issues of fundamental constitutional rights and due

process of law. See, Duncan v. Louisiana, 391 U.S. 145 (1968). It is noted that the concurrence of 10 out of 12 jurors was found acceptable in Apodoca v. Oregon, 406 U.S. 404 (1972), and that a nine of twelve concurrence was approved in Johnson v. Louisiana, 406 U.S. 356 (1972). However, both cases involved 12 member juries, and were decided prior to the empirical studies which contributed to the later decisions in Ballew and Burch. Additionally, a state criminal proceeding requiring unanimous concurrence by a six member jury was upheld in Williams v. Florida, 399 U.S. 78 (1970).

The jury trial must consist of a membership sufficient to promote group deliberation and to insulate members from outside intimidation. This latter factor is especially pertinent in the military setting, given the possibility of unlawful command influence. Ballew, supra,

U.S. v. Corcoran, 17 M.J. 137 (CMA, 1984). U.S. v. Karlson, 16 M.J. 469 (CMA, 1983). See also U.S. v. Porter, 17 M.J. 377 (CMA, 1984), Chief Judge Everett concurring. A major rationale for a civilian jury to consist of at least six persons, with a unanimous verdict if the court is that small, is to insure that the membership is drawn from and represents a cross-section of society. However, that premise does not necessarily obtain in the military, since court members are selected by superior commanders as part of the referral process for court-martial duty, and those who are directed to serve as court members are drawn from a narrow pool of persons, who, on the whole, share similar educational and professional backgrounds, similar opinions and values, and common and mutual career aspirations. Given these factors, the dynamics of civilian

jury trials, absent any empirical data to the contrary, should be presumed to apply equally to military trials. Therefore, six members on a military court is not enough to reasonably insure that the accused is tried by a representative cross section of his society, and it is requested that the panel consist of twelve members. Because the members will inevitably, as noted above, share many common values, the concerns regarding nonunanimous voting noted by the Supreme Court cannot be adequately guarded against unless the twelve members of the panel vote unanimously upon any conviction and sentence.

It is recognized that there is authority stating that the Sixth Amendment does not apply to the military, that the accused is not entitled to a six member court, and that the military jury is not required to convict upon a unan-

imous finding. It is submitted that this authority should be reconsidered, since it rests on historical conditions which no longer exist, as well as a perceived distinction between civilian and military societies which, it is submitted, does not exist. The military, at the time of the framing of the constitution, had jurisdiction over only military offenses during peacetime. Courts-martial were therefore no considered "convictions." O'Callahan v. Parker, 395 U.S., at 271. The jurisdiction of military courts has greatly expanded since that time, and courts-martial now adjudge federal convictions for common law crimes. That the court-martial is a federal court has been impliedly recognized by military appellate courts. United States v. Dorsey, 16 M.J. 1 (CMA 1983) (compulsory process), United States v. Knight, 15 M.J. 202 (CMA 1983) (effective assistance

of counsel on appeal), United States v. Rowsey 14 M.J. 151 (CMA 1982) (speedy trial), United States v. Rivas, 3 M.J. 282 (CMA 1982) (effective assistance of counsel at trial), United States v. Grunden, 2 M.J. 116 (CMA 1977) (public trial). Because military courts now try the same crimes that civilian courts try, the protections provided to the accused should include those rights enjoyed by civilians at the time of the framing of the Sixth Amendment, and the rights enjoyed in civilian courts today.

In contrast to the language found in the Fifth Amendment, nothing in the Sixth Amendment expressly exempts the military from its guarantees. The exclusion of the servicemember from the jury trial requirement is thus based on needs and circumstances of the military, i.e., military necessity. See, U.S. v. Tempia, 37 CMR 249 (CMA 1967), U.S. v. Guilford,

8 M.J. 598 (ACMR 1979), pet. denied at 8 M.J. 242 (CMA 1980), U.S. v. Yoakum, 8 M.J. 763 (ACMR 1980), U.S. v. Seivers, 9 M.J. 612 (ACMR 1980), U.S. v. Montgomery, 5 M.J. 832 (ACMR 1978). A general statement that the military is "different" is not sufficient to justify denial of basic constitutional rights to an accused. See, Matthews, supra. The provisions of Article 52 permit variations in panel size from jurisdiction to jurisdiction constitute a denial of equal protection in itself, especially given the possibility that the smaller panels may deliberate less effectively.

There exists no rational basis to subject servicemembers prosecuted in courts-martial to a lesser standard of due process that civilians with regard to the size and/or the uniformity of procedures. The present practice in federal civilian criminal cases calls for a

unanimous verdict from the fact-finder body consisting of twelve members. Rule 23 and 31(a), Fed.R.Cr.P. The reduction of the jury membership can only be accomplished with the consent of the accused. Rule 23, Fed.R.Cr.P. The Constitution grants Congress the power to raise and regulate armies. Art. I, Sec 8, Cl. 14, U.S. Constitution. But the express grant of a general power must be exercised in harmony with the express guarantees of the Bill of Rights; thus the exercise of the war power is also subject to constitutional limitations. Hamilton v. Kentucky Distilleries, 252 U.S. 146 (1919).

CONCLUSION

The defense prays that the court-martial consist of 12 members, who must vote unanimously to convict or adjudge

any sentence.

/s/
JOSEPH C. SWETNAM
CPT, JAGC
Trial Defense Counsel

UNITED STATES ARMY
HEADQUARTERS, 2D ARMORED DIVISION
(FORWARD)
APO New York 09355

COURT-MARTIAL CONVENING ORDER NUMBER 4 — 10 JAN 1984

Pursuant to authority contained in General Order Number 3, Department of the Army, dated 19 January 1981, a general court-martial is hereby convened. It may proceed at this headquarters to try Private E2 Randy J. Delacruz, 553-08-1620, US Army, C Company, 4th Battalion, 41st Infantry Regiment, 2d Armored Division (Forward), APO New York 09355. The court will be constituted as follows:

MEMBERS

LTC RICHARD D. BENJAMIN, 559-56-2127

LTC BILLY K. SOLOMON, 465-74-4119

MAJ RAYMOND J. LEISNER JR., 274-46-3267

MAJ HOWARD S. PERRY III, 460-68-6946

CPT SAMUEL L. BOULWARE, 250-90-6766

CPT FORREST B. LONG, 244-72-7931

CPT RONALD A. PARKER, 342-42-0808

In the event the accused submits a request pursuant to Article 25(c), UCMJ, that enlisted members serve on the court-martial, the three detailed junior officer members named above are excused, and the members will be as follows:

LTC RICHARD D. BENJAMIN, 559-56-2127

LTC BILLY K. SOLOMON, 465-74-4119

MAJ RAYMOND J. LEISNER JR., 274-46-3267

MAJ HOWARD S. PERRY III, 460-68-6946

CSM DIETER POST, 157-30-6639

CSM JOHN F. VELD, 010-30-4550

1SG ALLEN E. LUCIOUS, 232-56-8009

BY COMMAND OF BRIGADIER GENERAL TAIT

/s/
MIGUEL A. MONTANEZ, SR.
CW2, USA
Legal Administrator

DISTRIBUTION:
1-Ea Indiv Conc
1-CDR, 2nd AD (FWD)
1-Record of Trial
1-Rec/Ref Set

UNITED STATES COURT OF MILITARY APPEALS

United States, Appellee	)	USCMA Dkt. No. 55198/AR
	)	CMR Dkt. No. 447095
vs.	)	O R D E R
Randy J. DELACRUZ (553-08-1620), Appellant	)	

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, it appears that appellant's court-martial was properly constituted and its verdict rendered under the Uniform Code of Military Justice, 10 U.S.C. Section 801 et. seq. Accordingly, it is by the Court this 13th day of January, 1987

ORDERED:

That said petition is granted; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,
/s/ John A. Cutts, III
Deputy Clerk of the Court

cc:
Judge Advocate General of the Army
Appellate Defense Counsel (ST. JAMES)
Appellate Government Counsel (O'HARE)

UNITED STATES ARMY
COURT OF MILITARY REVIEW

Before
O'ROARK, WATKING and LYMBURNER
Appellate Military Judges

United States, Appellee	)	CM 447095
vs.	)	2d Armored Division (Forward)
Private E-2 Randy J. DELACRUZ (553-08-1620), United States Army, Appellant	)	D. Morgan Military Judge

For Appellant: Lieutenant Colonel Paul J. Luedtke, JAGC, Captain Wendell A. Hollis, JAGC, Mr. William C. Halsey, Esquire (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Patrick J. Cunningham, JAGC (on brief).

30 April 1986

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact.

Accordingly, those findings of guilty and the sentence are AFFIRMED.

Chief Judge O'ROARK took no part in the decision of this case.

FOR THE COURT:

/s/
WILLIAM S. FULTON, JR.
Clerk of the Court